

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS**

THE HIPSAVER COMPANY, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
J.T. POSEY COMPANY,	)	
	)	
Defendant.	)	
AND RELATED COUNTERCLAIM.	)	
	)	

**DECLARATION OF DOUGLAS H. MORSEBURG  
IN OPPOSITION TO THE MOTION OF HIPSAVER COMPANY, INC. FOR  
LEAVE TO TAKE ADDITIONAL DISCOVERY**

I, Douglas H. Morseburg, declare:

1. I am an attorney at law duly licensed to practice before all of the courts of the State of California and I am admitted to practice in this matter pro hac vice. I am an attorney at Sheldon & Mak and am one of the attorneys responsible for representing J.T. Posey Company ("Posey") in this matter. I have personal knowledge of the facts set forth below and, if called as a witness and properly sworn, I could and would testify thereto from my own personal knowledge, except as where stated on information and belief and, as to those facts, I believe them to be true. I make this declaration in Opposition to the motion of Plaintiff and Counter Defendant The HipSaver Company, Inc.'s ("HipSaver") for leave to conduct additional discovery.

2. I attended the deposition of Edward L. Goodwin on October 18, 2005. Attached as Exhibit "1" is a true and correct copy of an email he identified as one he sent to Posey's president, Ernest Posey, on April 2, 2005.

3. On July 12, 2005, there was hearing in this matter on, among other things, a motion for summary judgment that Posey had filed. A true and correct copy of a portion of the transcript of that hearing is attached as Exhibit "2".

4. On or about January 10, 2006, I received a letter from HipSaver's counsel, Edward Dailey. In it, Mr. Dailey complained about some material posted on the Internet at the following web address: [www.elderdepot.com](http://www.elderdepot.com). A true and correct copy of one page of Elder Depot's website and which accompanied Mr. Dailey's letter is attached as Exhibit "3".

5. Attached as Exhibit "4" is a true and correct copy of Elder Depot's "About Us" web page which I printed on January 26, 2006.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this declaration was executed this 26<sup>th</sup> day of January 2006 at Pasadena, California.

/s/ Douglas H. Morseburg  
Douglas H. Morseburg

**EXHIBIT 1**

Tue 8/23/05 9:25 AM

Page: 1

Email Message

From: HipSaver .  
Sent: 4/ 2/05 7:13 PM  
To: Ernie Posey  
Subject: CDC laundry

---

and while you are off like a Pavlovian dog on your elusive CDC launderabe hip protector we should remind you that we will be pulling your ostrich head out of the sand soon. This time we will be relentless.

PS: Poron, ~~been there done that~~ 10 years ago — no good.

Edward L. Goodwin  
President  
HipSaver  
7 Hubbard Street  
Canton, MA 02021  
Toll Free in US: 1-800-358-4477  
781-828-3880  
Fax: 781-821-6514

<http://www.hipsavers.com/>

\*\*\* The User Friendly Hip Protector  
incorporating the dual mechanism airPad \*\*\*

PC 0080

**EXHIBIT 2**

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

THE HIPSAVER COMPANY, INC., )  
Plaintiff )  
-VS- ) CA No. 05-10917-PBS  
J.T. POSEY COMPANY, ) Pages 1 - 26  
Defendant )

MOTION HEARING

BEFORE THE HONORABLE PATTI B. SARIS  
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

EDWARD J. DAILEY, ESQ. and PETER J. KAROL, ESQ.,  
Bromberg & Sunstein, 125 Summer Street, Boston,  
Massachusetts, 02110-1618, for the Plaintiff.

ANTHONY J. FITZPATRICK, ESQ., Duane Morris,  
470 Atlantic Avenue, Suite 500, Boston, Massachusetts, 02210,  
for the Defendant.

JEFFREY G. SHELDON, ESQ., Sheldon & Mak,  
225 South Lake Avenue, 9th Floor, Pasadena, California,  
91101, for the Defendant.

United States District Court  
1 Courthouse Way, Courtroom 19  
Boston, Massachusetts  
July 12, 2005, 3:30 p.m.

LEE A. MARZILLI  
CERTIFIED REALTIME REPORTER  
United States District Court  
1 Courthouse Way, Room 3205  
Boston, MA 02210  
(617)345-6787

PROCEEDINGS

THE CLERK: The case of the HipSaver Company, Incorporated V. J.T. Posey Company, Civil Action No. 05-10917, will now be heard before this Court. Will counsel please identify themselves for the record.

MR. DAILEY: Good afternoon, your Honor. I'm Ed Dailey from Bromberg & Sunstein representing the plaintiff, HipSaver Company. With me is Peter Karol. Mr. Karol is going to argue for the plaintiffs this afternoon. With me also is Steve Ramsdell, and Mr. Goodwin, who is the president of the plaintiff, is in the courtroom.

THE COURT: Thank you.

MR. FITZPATRICK: Good afternoon, your Honor. Anthony Fitzpatrick from Duane Morris on behalf of the defendant. With me is lead counsel for J.T. Posey, Jeffrey Sheldon from Sheldon & Mak in California.

THE COURT: Let me start off by saying I am not going to transfer the action. This is my case. I remember it actually. We had a motion for a preliminary injunction hearing. It was a settlement in this Court's jurisdiction, and I don't see a good reason to transfer it at this point. At some later point, if it becomes apparent to me that we should transfer it, it would be one thing, but at least at this point -- I remember the case actually, and if it weren't for the settlement under my jurisdiction, you may well have

1 had a good point -- it's just I'm not going to transfer it.

2 But now let's get to the merits. Let me turn to  
3 HipSaver for a minute. How can I grant summary judgment? I  
4 mean, I've read the stuff.

5 MR. KAROL: Okay.

6 THE COURT: And I don't know whether it's new  
7 testing, old testing. How could I grant summary judgment for  
8 you?

9 MR. KAROL: Your Honor, it's completely fine with  
10 us if this Court decides not to grant summary judgment at all  
11 at this stage. We would certainly like the grant of summary  
12 judgment going forward because we feel that, at least as  
13 regards the exact provisions, it's clear from the face of the  
14 agreement that it is a notice provision and that the only  
15 issue here is whether or not there would be notice as to a  
16 further advertisement.

17 THE COURT: No, no, no. No, no, not further  
18 advertisement, as to additional testing, and I won't know  
19 that. "Further comparative testing," isn't that the word?

20 MR. KAROL: Yes, it is, I believe. So we're  
21 comfortable with no grant of summary judgment in either way  
22 at this point. We don't know when the test was actually  
23 done, your Honor. Though it's cited in Posey's brief that  
24 they feel that we've somehow consented to when the test was  
25 done, that's a fact issue that we're not certain about. We

1 just feel that it's relevant when the underlying impact study  
2 was done, and that goes to when the actual advertisement was  
3 put forward. The advertisement that they dispute was January  
4 of 2005. Therefore we feel that it's clear from the face of  
5 the agreement that there was notice that needed to be given  
6 in order to keep us all out of this court.

7 THE COURT: Why? Why did notice have to be given  
8 if there was no additional testing? Does the contract say  
9 notice has to be given for an additional advertisement based  
10 on old testing?

11 MR. KAROL: Well, your Honor, we feel that they  
12 would be reading into the Court and that Posey would be  
13 reading into the agreement an exception for old testing. We  
14 feel that that paragraph covers in addition to --

15 THE COURT: Let me say, you may have a cause of  
16 action based on new stuff that postdates the settlement  
17 agreement. You may. I mean, if there's inaccurate  
18 statements being made, I'm not sure it was covered by the old  
19 agreement. But if it's no new testing --

20 MR. KAROL: Oh, your Honor, it's not the new  
21 testing -- (Inaudible).

22 THE REPORTER: I'm sorry. I'm having trouble  
23 hearing you.

24 MR. KAROL: Your Honor, it would be only on the new  
25 ads that we're talking about as a violation of the breach, a

1 breach of the notice provision, not the actual underlying  
2 testing, as to the date of that. It's the advertisement that  
3 put forth the false claims about the testing and  
4 misrepresented the testing, which is of a later date than the  
5 settlement agreement.

6 THE COURT: Well, read the paragraph you're  
7 referring to. I thought it said notice of any further  
8 comparative testing.

9 MR. KAROL: Your Honor, "In the event of any  
10 further or comparative testing" is the first phrase, and we  
11 just think that that's a phrase that's kind of an  
12 introductory phrase into the notice provision and that the  
13 notice provision is really intended to apply to all  
14 advertisements.

15 THE COURT: Read the whole paragraph.

16 MR. KAROL: "In the event of any further  
17 comparative testing of Posey and consumer products by either  
18 party, neither party shall make commercial advertising use of  
19 the results or analysis related to such testing without first  
20 giving the other party at least 30 days' advanced written  
21 notice of the results or analysis." And we would contend  
22 that the centerpiece of that is the use of the --

23 THE COURT: I'm not sure you win on that. Now,  
24 assuming you don't win that, what happens? Do you still have  
25 a cause of action for false advertisement?

1 MR. KAROL: Oh, we certainly do, we do, and that's  
2 very much at the heart of our complaint is the false nature  
3 of this advertisement.

4 THE COURT: All right. Now, let me just jump to  
5 you for a minute. Let's assume that you win your argument  
6 that the notice doesn't go to any old testing, it only goes  
7 to new testing, but you still have false advertisement.

8 MR. SHELDON: No, I don't, your Honor. The release  
9 in the prior settlement agreement released all claims that  
10 could have been brought. I refer you to the declaration of  
11 Victoria Lewis that we filed. This testing was done in  
12 2002. The ads were first placed in 2002. She attaches the  
13 ads. They have a copyright notice. I'm dealing with ads  
14 that existed in 2002, not 2005.

15 THE COURT: Well, let me say this: I agree that  
16 anything up until the date of the settlement is precluded by  
17 the release; but if there was a new advertisement that had  
18 the exact same stuff, I don't think it's included in the  
19 release.

20 MR. SHELDON: Well, that's inconsistent with  
21 plaintiff's position that there was stuff on the Internet  
22 which existed prior to the release they can't be sued on and  
23 they don't even have to give us the backup data.

24 THE COURT: I don't know what their position is,  
25 and they may lose that too. I'm simply saying, I'm not

1 prepared to resolve that at this stage of the proceedings.  
2 I'm definitely not transferring it. I don't believe either  
3 side is entitled to summary judgment or a dismissal, and I  
4 think it needs to go forward with what the new ad is, what's  
5 in it, and whether or not that falls afoul of the settlement  
6 agreement or not.

7 MR. SHELDON: May I argue the Rule 12 dismissal  
8 motion?

9 THE COURT: Yes, you may.

10 MR. SHELDON: And I'd like to go back and at least  
11 give a shot on the transfer motion.

12 THE COURT: I'm not doing it. It's just not worth  
13 your time. I've read everything. It's my settlement  
14 agreement. And I understand that, well, you know, absent the  
15 existence of an agreement that happened in this court to  
16 resolve a preliminary injunction here, which I actually even  
17 remember, I might well say you're right, you know, if it was  
18 just a sort of race-to-the-courthouse kind of thing for the  
19 first-time round. But it isn't, so don't waste your breath  
20 on it. But I will hear you on the motion to dismiss which I  
21 haven't given you a chance to argue yet.

22 MR. SHELDON: The problem with the complaint, it  
23 doesn't make clear what advertisement they're complaining  
24 to. When you read all the papers, it does. And I think this  
25 was intentional. All it says was, "In 2005, initiated an

1 enhanced advertising campaign." That's all we know. This  
2 advertising campaign, as I said, started in 2002. So we  
3 weren't clear what they're complaining about.

4 The other thing, on the breach of contract claim,  
5 they never alleged they have performed under that contract,  
6 and that's important because if they say that we had to give  
7 notice on ads that continued, why don't they have to give  
8 notice on their temperature ad? So that I think they should  
9 be obliged to say that they have performed under the  
10 contract. That's an element of a breach of contract claim,  
11 and it doesn't appear in the complaint.

12 THE COURT: Well, let me ask you this: If it's  
13 just a question of them not specifying that there were things  
14 that happened in 2005, do you want me just to make them amend  
15 it? Because that's really all it would involve.

16 MR. SHELDON: I do. When we filed our papers,  
17 we're guessing what the complaint was directed to.

18 THE COURT: In the papers you refer to ads that  
19 happened after the date of the settlement agreement. Maybe  
20 I'm not remembering. Does the complaint specifically  
21 reference those?

22 MR. KAROL: Yes, it does, your Honor. In the  
23 demand for relief, it specifically references it. The actual  
24 name of the impact study had references to it. It's not in  
25 the actual -- (Inaudible).

1 THE REPORTER: I'm sorry, I didn't hear you. "It's  
2 not in the actual. . ."

3 THE COURT: Don't forget, she's got to write this  
4 down.

5 MR. KAROL: I'm sorry. I know I mumble at times.  
6 It was in the demand for relief. It was part of the  
7 complaint, and it's cited on the page of the complaint. In  
8 our memorandum we do cite to --

9 THE COURT: Your memorandum, that's not good  
10 enough.

11 MR. KAROL: No, no, no, in the actual complaint,  
12 it's in there, as in the demand for relief, we ask them to  
13 specifically -- we ask the Court to specifically halt that  
14 particular ad. It's in the complaint itself.

15 THE COURT: Is it?

16 MR. SHELDON: It's in the prayer for relief, but  
17 it's not in the body of the complaint. And let me add, on  
18 the --

19 THE COURT: Well, as far as I'm concerned then,  
20 that's the only ad at issue here. Is that right?

21 MR. KAROL: Yes.

22 THE COURT: All right, so then we don't need to  
23 have an amendment here. And if you want to add any other  
24 ads, you have to change the complaint because that's the only  
25 ad we're talking about, the only ad postsettlement, so

1 apologize. I did not see that. I am not aware of a revised  
2 ad. There was certainly back-and-forth colloquy or dialogue  
3 between me and Mr. Sheldon, but I do not understand that  
4 there was a revised ad.

5 MR. SHELDON: I have the letter right here, your  
6 Honor.

7 THE COURT: You might want to confer afterwards.  
8 We don't need to resolve that right now. I hope you have a  
9 nice rest of the summer. I hope you resolve this, but if you  
10 don't, I definitely remember this contest, and so I will  
11 resolve it this time. Okay, thank you.

12 MR. DAILEY: Thank you, your Honor.

13 THE CLERK: All rise. Court is in recess.

14 (Adjourned, 4:00 p.m.)  
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C E R T I F I C A T E

UNITED STATES DISTRICT COURT )  
DISTRICT OF MASSACHUSETTS ) ss.  
CITY OF BOSTON )

I, Lee A. Marzilli, Official Federal Court  
Reporter, do hereby certify that the foregoing transcript,  
Pages 1 through 26 inclusive, was recorded by me  
stenographically at the time and place aforesaid in Civil  
Action No. 05-10917-PBS, The HipSaver Company, Inc. Vs. J.T.  
Posey Company, and thereafter by me reduced to typewriting  
and is a true and accurate record of the proceedings.

In witness whereof I have hereunto set my hand this  
18th day of July, 2005.

---

LEE A. MARZILLI, CRR  
OFFICIAL FEDERAL COURT REPORTER

**EXHIBIT 3**

[Print Window](#)[Close Window](#)**Hipsters Incontinent Brief**

Product # WP1195

**Details****Hipsters Incontinent Brief**

Designed to be used over adult diapers with a convenient snap front to simplify application and accommodate a wide range of incontinent products.

**FEATURES:**

- Convenient snap front for easy application over adult diapers
- Constructed of a comfortable poly/cotton material
- Secures using front snaps and includes comfortable elastic waist and leg bands
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- Fits discreetly under men's and women's clothing
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- Available in 6 sizes (choose below)

**Hipsters Proved Effective in Impact Testing:**

In recent tests performed at UCLA, "Hipsters" were shown effective in reducing the force of impact in simulated falls to 36% below the average fracture threshold of the proximal femur, and Hipsters outperformed all other hip protectors tested.

SIZE CHART		
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Small	28"-30"	35"-37"
Medium	30"-34"	37"-41"
Large	34"-38"	41"-45"
X-Large	38"-42"	45"-49"
XX-Large	42"-46"	49"-53"

**Price: \$44.95**

HS 000159

**EXHIBIT 4**



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**About Elder Depot**

**Our Company:**

Elder Depot recognizes the important role that caregivers have being involved with the care of an elderly loved one. We are committed to providing a wide variety of innovative products to improve the quality of life for both the caregiver and recipient.

Elder Depot's primary goal is customer satisfaction through the continual improvement of our web site, so that we can offer our customers new and useful products, services, and information. Some of our newest time-saving features include personalized shopping through Elder Express Lane and convenient delivery options through our Automatic ReOrder Program. Our product selection and web site features will continue to expand and grow to fit our customers' needs.

If you cannot locate an item you need on our web site or have suggestions for products to be added, please contact customer service at [service@elderdepot.com](mailto:service@elderdepot.com) or call (800) 910-7790 Monday through Thursday, 9am-7pm EST or Friday 9am-3pm EST.

**About the Founder:**

~~Kristen Pipher has dedicated over five years to caring for her dependent grandparents. Both suffered from Alzheimer's Disease and other physical ailments. After her grandmother passed away from kidney failure in 2002, Kristen made the decision to develop a comprehensive web site to help others care for their aging relatives and friends; leading to the establishment of Elder Depot. Kristen is dedicated to providing other caregivers with quality products at reasonable prices, as well as convenient services to save time and make daily life easier for both the caregiver and recipient.~~

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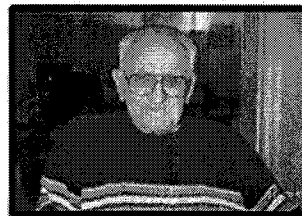
**Rose Schaefer**

(August 27, 1908 - May 29, 2002)



**Ernest Schaefer**

(April 28, 1909 - February 21, 2004)



**Garden of Memory:** "God's finger touched her and she slipped away  
From earth's dark shadows to a brighter day; God saw the road was  
getting rough, The hills were hard to climb; He gently closed her weary  
eyes, And whispered, "Peace be thine." To a beautiful garden this friend  
has gone, To a land of perfect rest; Though she is gone she still lives on  
In the garden of memory."

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